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Substantive Criminal Law

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Abstract

This article is a survey of decisions of the Florida Supreme Court in the field of substantive criminal law as reported in Southern Reporter from December 1, 1987 through December 1, 1988.

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I. INTRODUCTION

This article is a survey of decisions of the Florida Supreme Court in the field of substantive criminal law as reported in Southern Reporter from December 1, 1987 through December 1, 1988.¹ Areas surveyed include criminal offenses, defenses to crimes, and sentencing. In general, the Florida Supreme Court was relatively quiet in these areas compared with previous years. As will be seen, most of the cases surveyed dealt with sentencing matters. Cases involving issues related to double jeopardy and lesser included offenses, normally included under substantive criminal law, are included in the survey article by Professor Gerald Bennett on Criminal Procedure.²

II. CRIMINAL OFFENSES

A. Possession of Burglary Tools

In *Thomas v. State*,³ the Florida Supreme Court settled a conflict between the Second and Fourth District Courts of Appeal involving the offense of possession of burglary tools.⁴ Supported by the supreme court's ruling in *Foster v. State*,⁵ the Second District Court of Appeal had ruled in a line of cases⁶ that where a person is found in possession of common household tools, the intent to use such items to commit a

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1. 514 So. 2d 1 through 532 So. 2d 1.

2. See G. Bennet, *Criminal Procedure* 13 NOVA L. REV. 849, 869 (1989).

3. 531 So. 2d 708 (Fla. 1988).

4. FLA. STAT. § 810.06 (1987).

5. 286 So. 2d 549 (Fla. 1973), *receded from in part*, *Jenkins v. Wainwright*, 332 So. 2d 477 (Fla. 1975).

6. *Crosby v. State*, 352 So. 2d 1247 (Fla. 2d Dist. Ct. App. 1977); *K.W. v. State*, 468 So. 2d 368 (Fla. 2d Dist. Ct. App. 1985); *James v. State*, 452 So. 2d 1048 (Fla. 2d Dist. Ct. App. 1984); *Frame v. State*, 388 So. 2d 1381 (Fla. 2d Dist. Ct. App. 1980), *appeal dismissed*, 394 So. 2d 1152 (Fla. 1980).

burglary⁷ can only be found from evidence that the items were in fact used to commit or attempt to commit a burglary. This statement of the law had been incorporated into the Florida Standard Jury Instructions in Criminal Cases, where the instructions require that the judge distinguish between "common tools" and tools that are "not common" and tailor the jury instructions accordingly.⁸ In *Thomas*, the supreme court recognized that this distinction created unnecessary confusion and sought to remedy it.

The facts in *Thomas* are not complicated. During a surveillance of a neighborhood where several burglaries had taken place, the defendant was apprehended by police after jumping over a fence and attempting to run away. At the time of his apprehension he was wearing a pair of socks over both hands and carrying a screw driver. Initially he gave the arresting officer a false name. He admitted he had entered the area to commit a burglary, but had been arrested before he was able to commit it. Of course, the confession could not be admitted without a *corpus delicti*, and the trial judge ruled it inadmissible for lack of sufficient independent showing of *corpus delicti*.⁹

Upon appeal of the trial judge's order dismissing the charge of possession of burglary tools (a screwdriver), the Fourth District Court of Appeal reversed. The court acknowledged the line of cases from the Second District Court of Appeal to the contrary, but wrote that the Second District Court of Appeal apparently had misinterpreted *Foster* by taking a statement from that case out of context. The district court of appeal focused on the literal wording of the statute, "possession . . . with intent to use the same, or allow the same to be used, to commit any burglary. . ."¹⁰ and emphasized that such intent could be proved by circumstantial evidence. The above stated facts surrounding Thomas's arrest were sufficient to establish the *corpus delicti* and together with his admission were sufficient to establish a *prima facie* case.

The Florida Supreme Court approved the Fourth District Court of Appeal's decision and specifically disapproved the line of cases from the Second District Court of Appeal to the contrary. The court also receded from *Foster* and its progeny "to the extent that they established different standards for common and uncommon tools or devices or oth-

7. The statute requires that possession be with intent to use the tools.

8. FLA.STD.JURY INST. (CRIM.), at 138.

9. *Thomas v. State*, 531 So. 2d 708, 709 (Fla. 1988).

10. FLA. STAT. § 810.06(1987).

erwise are inconsistent with this opinion."¹¹ Thus, paragraph 2b¹² of the instructions on Possession of Burglary Tools as contained in Florida Standard Jury Instructions in Criminal Cases should be eliminated, and paragraph 2a of that instruction should be given in each case.¹³

B. Carrying a Concealed Firearm While Under Indictment.

In *State v. Potts*,¹⁴ the supreme court declared unconstitutional Florida Statutes, section 790.07(2), which makes it a felony of the second degree for anyone under indictment to carry a concealed firearm.¹⁵ The very brief decision of the supreme court adopted the district court's decision, *Potts v. State*,¹⁶ in its entirety. The district court had found the statute violative of substantive due process, noting that while the state has a legitimate interest in protecting the health and safety of the public, criminalizing the status of being "under indictment" is not a reasonably related means of achieving this end.

C. First and Second Degree Felony Murder

In *State v. Dene*,¹⁷ the Florida Supreme Court clarified the long-muddled law in Florida regarding the distinction between first-degree and second-degree felony murder. Before discussing this case, reference to some of the pertinent statutes may be helpful. Florida Statutes, section 777.011, is the controlling law on charging principals, making someone who aids, abets, counsels, hires or procures a crime a principal

11. *Thomas*, 531 So. 2d at 710.

12. Paragraph 2b reads, "[The [tool] [machine] [implement] was used by (defendant) or someone else to commit a [burglary] [trespass].]"

13. Paragraph 2a reads, "[(Defendant) had a fully-formed, conscious intent that the [tool] [machine] [implement] would be used by him or someone else to commit a [burglary] [trespass].]"

14. 526 So. 2d 63 (Fla. 1988).

15. FLA STAT § 790.07(2) (1987) reads as follows: "Whoever, while committing or attempting to commit any felony or while under indictment, displays, uses, threatens, or attempts to use any firearm or carries a concealed firearm is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, and s. 775.084."

16. 526 So. 2d 104 (Fla. 4th Dist. Ct. App. 1987).

17. 533 So. 2d 265 (Fla. 1988). (This case was decided during the survey period (*supra* note 1), but was not actually published in the Southern Reporter until after the end of the survey period. However, because of its importance, and because of the dearth of Supreme Court cases construing criminal offenses during the survey period, the author decided to include it in this article.).

in the first degree. Florida Statutes, section 782.04(1)(a)2, provides that first-degree murder is committed when an unlawful killing is perpetrated by a person engaged in the perpetration or attempted perpetration of certain named felonies. Florida Statutes, section 782.04(3) provides that when a person is killed in the perpetration or attempted perpetration of certain named felonies, by a person other than the person engaged in the perpetration or attempted perpetration of the named felony, the crime is second-degree murder.

Nancy Steel Dene, the defendant, orchestrated the planning of a burglary and robbery of an elderly, invalid woman. The defendant was not present, however, at the commission of the crime. The defendant's co-principals, in carrying out the burglary and robbery, strangled and cut the throat of the elderly woman, causing her death.¹⁸ Dene was indicted for first-degree murder. The trial judge granted a directed verdict on the first-degree felony murder charge. The record did not reflect the basis for the directed verdict, but the supreme court assumed it was on the authority of numerous cases which had held that an accused must be present at the scene of the murder in order to be convicted of first-degree felony murder.¹⁹

The judge, over objection of the defense counsel, instructed the jury on second-degree felony murder, and to this lesser charge the jury returned a verdict of guilty. Subsequently, the defendant's motion for an arrest of judgment was granted based on her argument that she was not present at the scene and that the murder was committed by a person engaged in the perpetration of the robbery. The district court affirmed on appeal and certified the question to the Florida Supreme Court whether second-degree felony murder is limited to only those situations where the person who actually kills the innocent victim is not one of the principals in the commission of the felony.²⁰

In its review of the case, the court held that a plain reading of the statutes cited above makes it clear that presence at the scene is unnecessary for the charging and conviction of a principal for first-degree murder for a killing by a fellow principal during the commission of a felony. In so holding, the court overruled a series of cases starting in 1973 which uniformly held that presence at the scene was required.²¹

18. *Id.* at 266.

19. *Id.* at 270.

20. *Id.* at 266.

21. *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974); *Adams v. State*, 341 So. 2d 765 (Fla. 1976), *cert. denied*, 434 U.S. 878 (1977); *State*

The court also found that the second-degree murder conviction was inappropriate in this case, as the killing was committed by a principal, rather than someone other than the one committing the felony. Answering the certified question in the affirmative, the court made it clear that second-degree felony murder is present only when the killing is committed by an innocent bystander, police officer, victim, or other person not committing the felony.²²

Ironically, the defendant in this case, Nancy Steel Dene, succeeded in escaping conviction of either first-degree or second-degree felony murder. She avoided the most serious charge (and the proper charge under the facts of the case) because of the erroneous directed verdict by the trial judge. She also avoided the lesser charge of second-degree murder, despite the verdict of guilty to this charge by the jury, because it was the wrong charge.

III. DEFENSES TO CRIMES

The decisions dealing with criminal defenses were as sparse during this period as those dealing with criminal offenses. Nevertheless, there were two decisions of interest, one dealing with the insanity defense, the other with the defense of voluntary intoxication.

A. Insanity Defense

In *Smith v. State*,²³ the supreme court addressed a certified question of whether giving the standard jury instruction on insanity which had been disapproved in *Yohn v. State*²⁴ was fundamental error requiring reversal in the absence of objection. The court noted that the standard jury instruction in question had been approved by the court in 1977 in *Wheeler v. State*.²⁵ It was not until 1985, in the *Yohn* decision, that the supreme court found that this instruction did not "completely and accurately" state the Florida law with respect to the burden of

v. Jefferson, 347 So. 2d 427 (Fla. 1977); Enmund v. State, 399 So. 2d 1362 (Fla. 1981), *rev'd on other grounds*, 458 U.S. 782 (1982); Hite v. State, 364 So. 2d 771 (Fla. 2d Dist. Ct. App. 1978), *cert. denied*, 372 So. 2d 471 (Fla. 1979), *overruled in part*, State v. Lowery, 419 So. 2d 621 (Fla. 1982); Lowery v. State, 375 So. 2d 1075 (Fla. 4th Dist. Ct. App. 1979), *quashed*, 419 So. 2d 621 (Fla. 1982).

22. State v. Dene, 533 So. 2d 265, 270 (Fla. 1980).

23. Consolidated with State v. Lentz, 521 So. 2d 106 (Fla. 1988).

24. 476 So. 2d 123 (Fla. 1985).

25. 344 So. 2d 244 (Fla. 1977), *cert. denied*, 440 U.S. 924 (1979).

proof. While the instruction complained of did not "completely and accurately" state the law, the court ruled there was no constitutional infirmity in the instruction because there is no denial of due process to place the burden of proof of insanity on the defendant.²⁶ The conviction in *Yohn* was reversed, according to the court, because the standard instruction was not clear on the burden of proof and because the defendant had requested an instruction which better stated the Florida law than the standard instruction; it was not reversed because of fundamental error. Thus, in the absence of an objection by counsel at trial it is not fundamental error to give the "old" standard jury instruction which was disapproved in the *Yohn* decision.²⁷

B. Voluntary Intoxication

In *Robinson v. State*,²⁸ a first degree murder case, the supreme court reaffirmed its previous holding in *Linehan v. State*,²⁹ that where the evidence in the case shows only the use of intoxicants, but not intoxication, no instruction on the affirmative defense of voluntary intoxication is required. In *Robinson* the evidence of intoxication consisted of three beer cans found at the scene of the crime, testimony of a witness that earlier on the evening of the murder the witness saw the defendant drinking from a bottle of cognac, and the defendant's statement to police after his arrest, which referred to his consuming unspecified amounts of cognac, gin, and beer. Thus, while there was evidence of consumption of alcohol, there was no evidence that the defendant was intoxicated, and no instruction on voluntary intoxication was required.³⁰

IV. SENTENCING

The majority of criminal cases decided by the Florida Supreme Court during the period covered in this article dealt with sentencing. The four categories surveyed by this article were (A) departure from recommended guidelines; (B) trial court override of jury recommended

26. For this proposition the court cited the case of *Leland v. Oregon*, 343 U.S. 790 (1952).

27. It should be noted that the standard jury instruction disapproved by *Yohn* has since been amended. FLA. STD. JURY INST. (CRIM.), 304(b).

28. 520 So. 2d 1 (Fla. 1988).

29. 476 So. 2d 1262 (Fla. 1985).

30. *Robinson*, 520 So. 2d at 5.

sentence; (C) aggravating circumstances warranting the imposition of the death penalty; and (D) consideration of nonstatutory mitigating circumstances.

A. Departure from Recommended Guidelines

Florida Rules of Criminal Procedure 3.701(d)(11) requires that departures from the recommended guidelines, either up or down, be supported by clear and convincing reasons, stated in writing. The supreme court has enforced this provision with a steady stream of cases remanded for resentencing within the recommended guidelines.

1. Impermissible Departure

During this survey period, the supreme court held the following reasons impermissible to justify departing from the guidelines: cold-blooded nature of the offense, abuse of trust of family relationship, and presence of the victim's son in the house;³¹ quantity of drugs involved in the crime;³² no reason stated to justify consecutive sentences;³³ habitual offender status;³⁴ reasons not articulated in original sentencing order;³⁵

31. *Davis v. State*, 517 So. 2d 670 (Fla. 1987) (departure from guidelines may not be justified by reasons prohibited by guidelines, factors already taken into account in calculating guidelines score, or an inherent component of the crime. An appellate court reviews the reasons given to support departure and determines whether the trial court abused its discretion in finding those reasons to be clear and convincing; for a reason to be clear and convincing, it must be an appropriate reason for departure, and the facts of the case must establish the reason beyond a reasonable doubt. The court did note, however, that in some instances an abuse of the trust of a family relationship may be a valid reason for departure).

32. *Atwaters v. State*, 519 So. 2d 611 (Fla. 1988) (analogized from *State v. Mitschler*, 488 So. 2d 523 (Fla. 1986) where the court rejected a departure on the grounds that the theft involved sizable funds from a non-wealthy victim); *State v. Koopman*, 519 So. 2d 613 (Fla. 1988), a case presenting the same issue, was decided the same day with the same result, citing *Atwaters*.

33. *Robinson v. State*, 520 So. 2d 1 (Fla. 1988) (trial court erred in departure without stating clear and convincing reasons for three consecutive life sentences for three noncapital offenses).

34. *Hester v. State*, 520 So. 2d 273 (Fla. 1988) (habitual offender statute may be used to extend the maximum penalty in a manner consistent with the guidelines, but not as a reason for departure from the sentencing guidelines recommendation). See also *Winters v. State*, 522 So. 2d 816 (Fla. 1988); *State v. Kersey*, 524 So. 2d 1011 (Fla. 1988); *Tillman v. State*, 525 So. 2d 862 (Fla. 1988); and *State v. Brown*, 530 So. 2d 51 (Fla. 1988).

victim's psychological trauma;³⁶ unsupported flagrant disregard for safety of others;³⁷ pattern of drug and alcohol abuse over such a period of time that rehabilitation is unlikely;³⁸ speculation about what might have occurred if third party had not intervened;³⁹ lack of prior criminal record;⁴⁰ prior civil commitment unrelated to criminal conviction and supervision as treatment for mental disorder;⁴¹ and status of official offered bribe when sentencing the offeror.⁴²

2. *Permissible Departure*

The supreme court discussed six reasons which justified departure from the guidelines: extensive juvenile record and timing of offenses in

35. *Brumley v. State*, 520 So. 2d 275 (Fla. 1988) (trial court must articulate all reasons for departure in the original sentencing order and may not enunciate new reasons for departure after reversal of the original sentence by an appellate court); *Morganti v. State*, 524 So. 2d 641 (Fla. 1988), a case presenting the same issue, was decided six weeks later with the same result.

36. *Barrentine v. State*, 521 So. 2d 1093 (Fla. 1988) (victim's psychological trauma was not a valid reason to depart from guidelines sentence for conviction of lewd and lascivious assault upon a child, citing *Lerma v. State*, 497 So. 2d 736 (Fla. 1986)); *State v. Jagers*, 526 So. 2d 682 (Fla. 1988), a case presenting the same issue, was decided seven weeks later with the same result, holding that every lewd and lascivious assault upon a child that proceeds to trial involves a degree of trauma to the victim and such an inherent component of the offense cannot support departure. *See also* *Anthony v. State*, 524 So. 2d 655 (Fla. 1988) (emotional trauma of victims was not a clear and convincing reason for departure from recommended guideline sentence where there were no extraordinary circumstances clearly not inherent in the crime charged and no physical manifestations of trauma).

37. *Anthony v. State*, 524 So. 2d 655 (Fla. 1988), where mere fact of being on a public street when firing shots into a car was not proof beyond a reasonable doubt of a flagrant disregard for the safety of others. *But see* *Scurry v. State*, 489 So. 2d 25 (Fla. 1986) (evinced a flagrant disregard for the safety of others may be an appropriate reason for departure).

38. *Tillman v. State*, 525 So. 2d 862 (Fla. 1988).

39. *Id.*

40. *State v. Sachs*, 526 So. 2d 48 (Fla. 1988) (lack of prior record not a valid basis for departure in a driving while intoxicated manslaughter conviction, as that factor is already taken into account by the guidelines).

41. *State v. Jagers*, 526 So. 2d 682 (Fla. 1988).

42. *State v. Hope*, 529 So. 2d 275 (Fla. 1988) (offering a bribe to a sitting circuit judge to influence his favorable treatment of a defendant in a criminal proceeding pending before the judge is not in and of itself a clear and convincing reason for departure from recommended guidelines sentence in sentencing the person offering the bribe).

relation to prior offenses and release from incarceration;⁴³ condition of plea bargain;⁴⁴ status of official accepting bribe when sentencing official accepting bribe;⁴⁵ temporal proximity of commission of crimes;⁴⁶ violation of community control;⁴⁷ and extraordinary emotional trauma of victim with physical manifestation.⁴⁸

B. Trial Court Override of Jury Recommended Sentence

The standard for imposition of the death sentence by the court when the jury has recommended a sentence of life imprisonment was set forth in *Tedder v. State*.⁴⁹ The principle enunciated there is that "in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."⁵⁰ The supreme court continues to require trial court adherence to this standard.

43. *Tillman v. State*, 525 So. 2d 862 (Fla. 1988) (clear and convincing reasons supported departure since those aspects of criminal history had not already been factored in to arrive at guidelines score and presumptive sentence).

44. *Quarterman v. State*, 527 So. 2d 1380 (Fla. 1988) (trial court may exceed recommended guidelines sentence based upon a legitimate and uncoerced condition of a plea bargain); *Smith v. State*, 529 So. 2d 1106 (Fla. 1988) (plea agreement, providing only for sentence within term less than statutory maximum for single charged offense, is adequate reason for exceeding guidelines up to the agreed maximum without stating reasons other than the fact of the agreement); *Smith v. State*, 530 So. 2d 304 (Fla. 1988) (plea bargain itself may serve as a clear and convincing reason for departure when the departure reason was accepted as an integral part of the bargain itself); *White v. State*, 531 So. 2d 711 (Fla. 1988) (trial court may depart from guidelines where defendant pleads guilty, agrees to waive imposition of guidelines as part of the plea agreement, and gives court discretion to impose sentence in the statutory range).

45. *Merckle v. State*, 529 So. 2d 269 (Fla. 1988) (defendant's status as circuit court judge and breach of public trust justified departure sentence for conviction of bribery).

46. *State v. Jones*, 530 So. 2d 53 (Fla. 1988) (temporal proximity of crimes can be considered a valid reason for departure from sentencing guidelines, provided timing demonstrates defendant's involvement in continuing and persistent pattern of criminal activity).

47. *Peters v. State*, 531 So. 2d 121 (Fla. 1988) (trial court may increase sentence by one cell for violation of community control when new crimes are committed while on probation).

48. *Harris v. State*, 531 So. 2d 1349 (Fla. 1988) (upward departure sentence for unarmed robbery, kidnapping, and sexual battery proper where victim suffered extraordinary emotional trauma, and sufficient physical manifestation of injury existed).

49. 322 So. 2d 908 (Fla. 1975).

50. *Id.* at 910.

The jury's advisory opinion is entitled to great weight, as it is a reflection of the conscience of the community.⁵¹ In four cases⁵² addressing the issue during the period covered by this article, the supreme court vacated the death sentence and override of the jury's recommended life sentence where it found sufficient mitigating circumstances to justify the jury's recommendation.

C. Aggravating Circumstances

The general principle regarding the application of the death penalty was stated by the Florida Supreme Court in *State v. Dixon*.⁵³ The basic premise is that the death penalty is so unique in its finality and total rejection of the possibility of rehabilitation that the legislature has reserved its application to only the most aggravated, unmitigated, and most indefensible of most serious crimes.⁵⁴

Of the nine cases surveyed on this issue during the period covered by this article, the Florida Supreme Court found sufficient aggravating circumstances and lack of mitigation in five cases to warrant affirming the death sentence. Aggravating circumstances found sufficient to justify the imposition of the death sentence included the following circumstances: especially heinous, atrocious or cruel capital felony, and capital felony of homicide committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification;⁵⁵ previous conviction of a felony involving violence, especially heinous, atrocious

51. *Holsworth v. State*, 522 So. 2d 348, 354 (Fla. 1988).

52. *Burch v. State*, 522 So. 2d 810 (Fla. 1988) (jury could have considered equal culpability of others not charged, and defendant's family history of physical and drug abuse, and early sentence as an adult for crimes committed as a juvenile as mitigating factors); *Brown v. State*, 526 So. 2d 903 (Fla.), *cert. denied*, 109 S.Ct. 371 (1988) (jury's recommendation could have been based not only on defendant's youth but also on his mental and emotional handicap and impoverished background); *Harmon v. State*, 527 So. 2d 182 (Fla. 1988) (reasonable people could have concluded that mitigating factors presented, disparate treatment of defendant in comparison with accomplice, and nonstatutory mitigating factors set forth in testimony of psychiatrist witness outweighed proven aggravating factors); *Holsworth v. State*, 522 So. 2d 348 (Fla. 1988) (jury could have concluded from evidence that defendant's conduct was affected by his use of drugs and alcohol and his physical abuse as a child, and the jury could have considered that defendant's employment history and positive character traits showed potential for rehabilitation and productivity within the prison system).

53. 283 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974).

54. *Id.* at 7.

55. *Jackson v. State*, 522 So. 2d 802 (Fla.), *cert. denied*, 109 S.Ct. 183 (1988).

and cruel, and murder committed during a robbery;⁵⁶ previous conviction of a felony involving violence and homicide committed during a robbery;⁵⁷ previous conviction of violent capital felony, murder committed during burglary, heinous, atrocious and cruel murder, and cold, calculated and premeditated murder;⁵⁸ and murder committed while on parole, previous conviction of armed robbery, murder committed for financial gain, and especially wicked, evil, atrocious, or cruel murder.⁵⁹

In the four remaining cases, the Florida Supreme Court found insufficient aggravating circumstances to outweigh mitigating factors and vacated the death sentence: murder committed during robbery by defendant with no significant history of prior criminal activity;⁶⁰ mere fact that victim was police officer and instantaneous murder by gunfire by eighteen-year-old defendant with mental and emotional handicap, impoverished background, and potential for rehabilitation;⁶¹ previous conviction of capital felony, creating great risk of death to many persons, homicide committed during kidnapping, homicide committed for purpose of avoiding lawful arrest, and capital felony committed for pecuniary gain by defendant under influence of extreme mental or emotional disturbance, with substantially impaired capacity to appreciate the criminality of his conduct, and an emotional age between nine and twelve years old;⁶² and, murder of previously unknown victim within two minutes of entering residence neither cold, calculated, and premeditated, nor heinous, atrocious, and cruel.⁶³ In a fifth case finding insufficient aggravating circumstances, the court found that a prior murder

56. *Mitchell v. State*, 527 So. 2d 179 (Fla.), *cert. denied*, 109 S.Ct. 404 (1988) (trial court found no mitigating circumstances. Florida Supreme Court reiterated that the theory of residual or lingering doubt as to guilt does not prevail in Florida, citing *King v. State*, 514 So. 2d 354 (Fla. 1987), *cert. denied*, 108 S.Ct. 2916 (1988), hence defendant's claim of insufficient evidence of guilt could not be a mitigating circumstance).

57. *Hamblen v. State*, 527 So. 2d 800 (Fla. 1988) (trial court found no mitigating circumstances. Defendant represented himself in penalty phase and did not appeal sentence. Dissent asserted doctrine of waiver of counsel inapplicable in death penalty).

58. *Turner v. State*, 530 So. 2d 45 (Fla. 1987) (trial court found that aggravating circumstances far outweighed the statutory and nonstatutory mitigating factors).

59. *Jackson v. State*, 530 So. 2d 269 (Fla. 1988) (trial court concluded that no statutory or nonstatutory mitigating circumstances existed and found five aggravating circumstances, four of which were validated on appeal).

60. *Lloyd v. State*, 524 So. 2d 396 (Fla. 1988).

61. *Brown v. State*, 526 So. 2d 903 (Fla.), *cert. denied*, 109 S.Ct. 371 (1988).

62. *Fitzpatrick v. State*, 527 So. 2d 809 (Fla. 1988).

63. *Amoros v. State*, 531 So. 2d 1256 (Fla. 1988).

conviction used as an aggravating factor by the trial court was later reversed and vacated, thus eliminating one of four aggravating circumstances.⁶⁴ The trial judge had found four aggravating circumstances and two firm statutory mitigating circumstances. Under these conditions, the court stated the question it must answer is this: "Would the result of the weighing process by both the jury and the judge have been different had the prior murder conviction not been used as an aggravating circumstance?"⁶⁵ Unable to find beyond a reasonable doubt that the elimination of this factor would not have changed the weighing process by either the jury or the judge, the court vacated the death sentence and remanded for a new sentencing proceeding.⁶⁶

D. *Consideration of Nonstatutory Mitigating Circumstances*

In *Hitchcock v. Dugger*,⁶⁷ the United States Supreme Court found reversible error where the jury was instructed to consider only statutorily enumerated mitigating circumstances, and the trial judge declined to consider nonstatutory mitigating circumstances. Following *Hitchcock*, the Florida Supreme Court has utilized a two-step test when reviewing cases where the judge improperly instructed the jury concerning nonstatutory mitigating circumstances. First, looking at the totality of the circumstances, the court asks whether it is likely that the jury was constrained? Second, if so, the court asks whether there was evidence of nonstatutory mitigating circumstances of such a degree that it might have affected the jury's recommendation or the trial court's consideration? If no mitigating evidence existed, the court can clearly find the erroneous instruction to have been harmless.⁶⁸ Additionally, the decision in *Lockett v. Ohio*,⁶⁹ in which the United States Supreme Court held that the sentencer must be permitted to consider any relevant mitigating evidence in deciding whether to impose the death penalty, is to be given retroactive effect both as to the advisory jury and the sentencing judge.⁷⁰ With regard to retroactivity, it is noted that one of the

64. *Long v. State*, 529 So. 2d 286 (Fla. 1988).

65. *Id.* at 293.

66. *Id.*

67. 481 U.S. 393 (1987).

68. *White v. Dugger*, 523 So. 2d 140 (Fla.), *cert. denied*, 109 S.Ct. 184 (1988).

69. 438 U.S. 586 (1978).

70. *Riley v. Wainwright*, 517 So. 2d 656 (Fla. 1987) (citing *Skipper v. South Carolina*, 476 U.S. 1 (1986), sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence).

cases reviewed in this survey involved a sentence imposed by a Florida circuit court as long ago as 1974.⁷¹

Of ten cases considered by the Florida Supreme Court on this issue during the period, five were remanded for new sentencing proceedings because either the advisory jury or the sentencing judge failed to consider the following nonstatutory mitigation circumstances: family background, character and capacity for rehabilitation;⁷² long history of mental illness and treatment, intoxication at the time of the murder, and remorse for the commission of the crime;⁷³ plea of guilty, expression of remorse, need for food as motive for robbery, never having previously fired a gun at a person, lack of knowledge of gun at presence of crime scene, and killing of officer as reaction to witnessing brother's death;⁷⁴ nonstatutory circumstances totally excluded in sentencing order;⁷⁵ and testimony of family and friends regarding employment history, attempts at rehabilitation since release from prior incarceration, testimony of girl friend regarding their relationship and defendant's character, and testimony of witnesses concerning defendant's relationship with accomplice in crime.⁷⁶

In the remaining five cases considered during the period on this issue, the Florida Supreme Court found the error to be harmless beyond reasonable doubt and affirmed the sentence.⁷⁷ The court found, in essence, that no nonstatutory mitigating evidence existed to offset the aggravating circumstances considered by the jury and court in sentenc-

71. *Cooper v. Dugger*, 526 So. 2d 900 (Fla. 1988).

72. *Riley v. Wainwright*, 517 So. 2d 656 (Fla. 1987).

73. *Foster v. State*, 518 So. 2d 901 (Fla. 1987), *cert. denied*, 108 S.Ct. 2914 (1988) (new sentencing proceeding mandated when apparent from record that sentencing judge believed that consideration was limited to mitigating circumstances set out in capital sentencing statute).

74. *Mikenas v. Dugger*, 519 So. 2d 601 (Fla. 1988).

75. *Combs v. State*, 525 So. 2d 853 (Fla. 1988) (consideration of nonstatutory mitigating circumstances improperly restricted by both jury and court under *Hitchcock* standard; principles of harmless error not applicable to facts of this case).

76. *Cooper v. Dugger*, 526 So. 2d 900 (Fla. 1988) (capital sentencing proceeding held in 1974 constitutionally deficient and new jury penalty phase proceeding mandated when judge and jury's consideration of mitigating circumstances limited to statutory factors in violation of *Hitchcock*).

77. *Booker v. Dugger*, 520 So. 2d 246 (Fla.), *cert. denied*, 108 S.Ct. 2834 (1988); *Tafero v. Dugger*, 520 So. 2d 287 (Fla. 1988); *Ford v. State*, 522 So. 2d 345 (Fla. 1988); *White v. Dugger*, 523 So. 2d 140 (Fla. 1988) (It is noted that the court used the phrase "clearly harmless" rather than "harmless beyond reasonable doubt"); *Smith v. Dugger*, 529 So. 2d 679 (Fla. 1988).

ing, that the judge would have sentenced the defendant to death regardless of the jury recommendation, and that such an override would have been consistent with the rationale of *Tedder v. State*.⁷⁸

78. 322 So. 2d 908 (Fla. 1975).